89-98

No. ———

Supreme Court, U.S.
FILED
JUL 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HAROLD DAVIS AND ENID DAVIS,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether taxpayers' donations sent directly to an ordained missionary are deductible as charitable contributions under 26 U.S.C. § 170, where such donations are made at the request and under the direction of the missionary's church, in amounts specified by the church, and with the primary purpose of benefitting the church's missionary effort.

LIST OF PARTIES

The caption of the case contains the names of all parties.

In addition to the parties, The Church of Jesus Christ of Latter-day Saints, which operates a world-wide missionary program supported by voluntary contributions from its members, has an interest in the outcome of this case.

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v.

THE UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Harold Davis and Enid Davis hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) as amended is reported at 861 F.2d 558 (9th Cir. 1988). The opinion of the district court (App., *infra*, 16a-25a) is reported at 664 F. Supp. 468 (D. Id. 1987).

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988. Rehearing was denied on April 20, 1989. App., *infra*, 27a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

26 U.S.C. § 170 states in relevant part:

> (a) ALLOWANCE OF DEDUCTIONS.
>
> (1) General Rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year . . . .
>
> (c) CHARITABLE CONTRIBUTION DEFINED.
>
> For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
>
> (2) A corporation, trust or community chest, fund, or foundation—
>
> * * * *
>
> (B) [O]rganized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, ...

STATEMENT

1. Petitioners Harold and Enid Davis, who reside in Idaho, are and were at all times relevant to this case members of The Church of Jesus Christ of Latter-day Saints (the "Church"), also known as the Mormon Church. The Church is a recognized tax-exempt organization with more than four million members in the United States. App., *infra*, 39a. As one of its primary functions, the Church operates a world-wide missionary program with unpaid, full-time volunteers serving as missionaries. These missionaries are selected according to strict standards of moral worthiness, faith, commitment, obedience, and physical and emotional fitness. App., *infra*, 29a, 39a. The Church currently has approximately 36,000 missionaries serving worldwide, of whom more than 25,000 are from the United States. Watson, *Statistical Report 1988*, The Ensign, May 1, 1989, at 19 (official church publication).

During the period relevant to this litigation, two of petitioners' sons—Benjamin and Cecil—served as Church missionaries. In 1979, Benjamin Davis was interviewed by his Bishop (a leader of a local congregation) and by his Stake President (a leader of several local congregations) who determined that Benjamin was worthy and suitable to serve as a missionary for the Church. These Church officers then submitted written recommendations to Church headquarters that Benjamin be "called" or appointed as a full-time missionary. Thereafter, the President of the Church sent a letter to Benjamin calling him to serve for two years as a missionary in the New York Mission. He was ordained an Elder, missionary and minister of the Church and sent to the Church's Missionary Training Center in Provo, Utah for two weeks of instruction and training. He then travelled to New York where he labored as a missionary until December 1981, serving and living in various areas selected by his Mission President (a leader responsible for full-time missionary operations in a particular region). App., *infra*, 17a, 40a-41a.

In a similar manner, Cecil Davis was called by the Church to serve as a missionary in the New Zealand/Cook Islands Mission. He was also ordained an Elder, minister and missionary of the Church. After attending the Missionary Training Center, Cecil was sent to the Cook Islands in 1981, where he served for eighteen months. App., *infra*, 18a, 42a.

While serving as missionaries, Benjamin and Cecil were not allowed to take vacations or to travel for personal purposes, and neither did so. Instead, they were expected to, and did, conform to a daily schedule which called for at least 10 hours per day of missionary work in addition to study time, meal time and planning time. App., *infra*, 30a. Benjamin averaged over 70 hours per week of missionary work plus 10 hours per week of study and preparation. Cecil averaged 60 hours per week of

missionary work plus 10 to 25 hours per week of study, including language study. App., *infra*, 43a-44a. Throughout their missions they were subject to the direct supervision and control of their mission presidents and other Church leaders who set rules governing their proselyting schedules, dress and grooming habits, theological and language training and other activities. Mission rules prohibited, among other things, dating, watching movies and plays and participating in certain sports. App., *infra*, 3a, 30a.

2. Neither Benjamin nor Cecil had saved sufficient money to pay all the costs of his mission. In such cases, it is and has long been the practice of the Church first to ask a missionary's family to contribute the necessary financing. App., *infra*, 2a, 31a. If a missionary's family is unwilling or unable to contribute the necessary funds, the Church seeks donations from other Church members living in the same community as the missionary, or supplies funds from other Church sources, so that all prospective missionaries who are willing and eligible are able to serve. App., *infra*, 31a.

When a parent or any other member of the Church donates money to defray a missionary's expenses, the Church strongly prefers that the donor send the funds directly to the missionary. App., *infra*, 31a-32a. Through a century and a half of experience with its missionary program, the Church has determined that this direct transmittal of contributions produces several specific and important benefits to the Church and its members. First, direct transmittal fosters commitment and frugality among the Church's missionaries by making them more aware of the personal sacrifices being made by the donors. Knowing that his or her family bears the financial burden of a missionary's service helps remind the missionary that the mission is a period of dedication, service and sacrifice. Second, direct transmittal makes the donor feel more a part of the missionary's efforts, thereby fostering and

reinforcing the spirit of mutual sacrifice that is central to Church doctrine. This sharing in the missionary effort is particularly valuable when the missionary is a member of the donor's family. Third, direct transmittal reduces the substantial administrative and bookkeeping requirements that would otherwise be imposed on the Church, thereby preserving the Church's resources for additional charitable and religious work. App., *infra*, 3[illegible] 32a.

The Church exercises substantial control over such direct donations at two levels. First, the Church specifies the amount each missionary will need and, accordingly, the amount that donors will be requested to contribute. App., *infra*, 2a, 29a, 33a. The amounts requested depend upon living costs in each mission area and are set at a level that requires each missionary to be frugal. App., *infra*, 32a-33a. Indeed, the Church has a strong incentive to set the requested missionary contributions at low levels, and has consistently done so over the years. The reason is that a low spending limit not only lessens the financial burden on Church members, but also, in the Church's experience, increases the dedication and effectiveness of its missionaries. See App., *infra*, 30a-31a. In short, the Church has found that its missionaries are most effective in their service when their expenditures are kept within the limits specified by the Church.

Second, the Church exercises substantial control over expenditures made by individual missionaries. Missionaries are given specific instructions with respect to the expenditures of donated funds and are required to keep financial records of all expenditures. These financial instructions are given to each missionary on numerous occasions and are printed in a handbook that each missionary carries at all times. App., *infra*, 32a-33a. Moreover, to ensure that these instructions are followed, each missionary is required to submit a weekly report to his or her Mission President listing, among other things, his or her expenditures. App., *infra*, 3a, 38a.

The control exercised by the Church over missionary donations is well illustrated in the present case. Shortly after each of the petitioners' sons was called as a missionary, the Church sent a letter specifying the expected level of expenses for each mission. Based on Church custom and practice, the petitioners understood that these letters were intended by the Church to establish the amounts which the Church desired each missionary to receive. App., *infra*, 36a. In each case, the Church adjusted the specified amount as circumstances changed. The amount specified for Benjamin's mission to New York averaged $290 per month in 1980 and $350 per month in 1981 (see App., *infra*, 41a), and the amount specified for Cecil's mission to the Cook Islands averaged $225 in 1981 (see App., *infra*, 42a). The charitable contribution deductions at issue in this case did not exceed the amounts set by the Church. App., *infra*, 4a, 36a. Both missionaries in this case, moreover, made a commitment to petitioners to use the missionary funds only in accordance with the Church's instructions. App., *infra*, 36a. Finally, both missionaries completed weekly reports detailing their expenditures. App., *infra*, 44a. In sum, the amounts donated, the method of payment and the expenditure of donated funds were all in accordance with the requests and instructions of the Church.

The petitioners' intent in making these contributions was to benefit the religious and charitable work of the Church. Petitioners expressly declared, without contradiction, that their primary motive was "a sincere religious desire to . . . support the Church's missionary program." App., *infra*, 36a.

3. Petitioners initially filed their income tax returns for taxable years 1980 and 1981 without claiming as charitable contribution deductions the amounts paid to finance the missionary services of their sons. In 1984, the Tenth Circuit held in *White* v. *United States*, 725 F.2d 1269 (10th Cir. 1984), that identical contributions

were deductible as charitable contributions under 26 U.S.C. § 170, as long as the "primary purpose" of those contributions was to benefit the charitable organization. 725 F.2d at 1272. Section 170 provides a deduction for contributions made "to *or for the use of*" a qualified charitable organization.

In light of the *White* decision, petitioners amended their returns and filed a claim for refund with the Internal Revenue Service. When their claim was denied, the taxpayers filed a refund action in the United States District Court for the District of Idaho.

While the case was pending before the district court, the Fifth Circuit ruled in *Brinley* v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986), that contributions transmitted directly to the Church's missionaries are "for the use of" the Church within the meaning of Section 170 and are therefore fully deductible provided that the Church exercises some control over the contributions. *Id.* at 1334. The Fifth Circuit held that such control would be established if the taxpayer could show that the Church requested specific payments to a missionary, that the taxpayer responded to that request and that the amounts claimed as a deduction did not exceed the amount specified by the Church. *Id.* at 1335-36. According to that court, "full control in the form of actual or physical possession" is not required. *Id.* at 1335.

The district court expressly declined to follow either the Fifth or the Tenth Circuit's interpretation of Section 170, and entered summary judgment in favor of the United States. The court concluded that a contribution by a third party to defray the costs incurred by a missionary of the Church is not "for the use of" the Church within the meaning of Section 170—and is therefore not deductible as a charitable contribution—unless the Church exercises control amounting to "possession of the contribution." App., *infra*, 24a. Recognizing that its decision was in conflict with *Brinley* and *White*, the district court

stated that it was "not bound by the rulings of the Tenth and Fifth Circuits." App., *infra*, 21a.

The Ninth Circuit affirmed the grant of summary judgment, essentially adopting the reasoning of the district court. The court of appeals explicitly rejected the Tenth Circuit's decision in *White* and the Fifth Circuit's decision in *Brinley*. App., *infra*, 9a. Instead, the Ninth Circuit held that a contribution made for the purpose of paying the costs of missionary service by another is "for the use of" the Church only if the Church has "actual control over [*i.e.*, possession of] the funds." App., *infra*, 9a. Summarizing its decision, the court concluded that "[t]he statutory system . . . does not provide for a deduction by a taxpayer who does not actually render service to the charity or made a contribution directly to the charity." App., *infra*, 15a.[1]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided an important and recurring issue of tax law in a way that directly conflicts with decisions of other courts of appeals. The court's interpretation of Section 170 also ignores the plain language of the statute, the reasoning of prior decisions by this Court and sound principles of statutory construction.

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[1] Like the district court, the Ninth Circuit also rejected the taxpayers' alternative argument that their contributions are deductible under Section 170 because they fall within Treasury Regulation 1.170A-1(g). That regulation permits a taxpayer to deduct as a charitable contribution "unreimbursed expenditures made incident to the rendition of services" to a qualified charitable organization. 26 C.F.R. § 1.170A-1(g) (1988). The courts below held that the regulation applies only to unreimbursed expenses incurred in connection with the taxpayer's own service to a charitable organization, and therefore does not apply to the missionary contributions at issue here. App., *infra*, 14a, 22a. In contrast, both *White* and *Brinley* had held that at least some portion of missionary contributions falls within Regulation 1.170A-1(g), even when the missionary services are rendered by someone other than the taxpayer. See *White*, *supra*, 725 F.2d at 1271; *Brinley*, *supra*, 782 F.2d at 1332.

The court's decision, moreover, creates a substantial impediment to the efficient and effective operation of the Church's missionary activities and imposes a serious burden upon millions of its American members, the vast majority of whom live in the Ninth and Tenth Circuits.

1. The decision of the Ninth Circuit is in direct and irreconcilable conflict with the holdings of the Tenth Circuit in *White* and the Fifth Circuit in *Brinley*. The Ninth Circuit has squarely held that contributions made for the purpose of paying the expenses of missionary service by another are deductible *only* if those contributions are made directly to the Church. See App., *infra*, 9a (requiring "actual control"), 15a (contribution must be "directly to the charity"). By contrast, the Tenth Circuit's decision in *White* and the Fifth Circuit's decision in *Brinley* permit missionary contributions to be deducted even when transmitted directly to the missionary rather than to the Church. The specific legal principle adopted by the Ninth Circuit's decision is therefore irreconcilable with that followed in *White* and *Brinley*, both of which involved facts virtually identical to those in this case. Indeed, the Ninth Circuit expressly acknowledged this conflict:

> The Tenth Circuit addressed this issue in *White v. United States*, 725 F.2d 1269 (10th Cir. 1984), in a factual setting indistinguishable from the one at bar . . . . Applying th[e] "primary purpose" test, the court determined that payment for the support of a full-time missionary who was away from home primarily served the goals of the Church rather than the missionary and was therefore deductible. *Id.* *See also Brinley v. Commissioner*, 782 F.2d 1326, 1330-32 (5th Cir. 1986) . . . . We decline to apply the primary purpose test here.

App., *infra*, 8a.

This conflict—particularly the one between the Ninth and Tenth Circuits—has unusually severe practical and

symbolic consequences. Approximately 40 percent (1.65 million) of the Church's 4 million American members live within the Ninth Circuit, while an approximately equal number (1.5 million) live within the Tenth Circuit.[2] Similar percentages of the Church's 25,000 American-born missionaries come from those two Circuits.[3] In practical terms, the Ninth Circuit's decision means that Church members living to the east of the border between the Ninth and Tenth Circuits (which runs from Montana to Mexico) can deduct contributions transmitted directly to the Church's missionaries, while those living to the west of that border cannot. Thus, a different rule applies to Church members in Denver, Salt Lake City and Albuquerque than applies to those in Boise, San Francisco and Phoenix. The existence of two contradictory tax rules that depend for their application solely upon geography not only creates administrative difficulties for the Church (and no doubt for the IRS), but also undermines public confidence in the tax laws.

The impact of this conflict in the interpretation of Section 170, moreover, is by no means limited to the Church and its members. Under the decision below, the phrase "for the use of" in Section 170 applies only to contributions placed in the actual possession of a charitable organization. Under the decisions of the Fifth and Tenth Circuits, by contrast, this statutory language also applies to contributions transmitted directly to third parties—provided those contributions satisfy a "primary purpose" or "primary benefit" test. The resulting doctrinal confusion affects a wide range of charitable contributions

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[2] Deseret News, *1989-90 Church Almanac*, 121 (1988). Approximately 173,000 (4.4 percent) of the Church's United States members live within the Fifth Circuit. *Id.*

[3] As of December 31, 1988, the Church had 25,465 missionaries from the United States, of whom 9,906 were from states within the Ninth Circuit, and 12,090 were from states within the Tenth Circuit. Missionary Department of the Church of Jesus Christ of Latter-day Saints, unpublished data (December 31, 1988).

beyond the Church's own missionary program. See, *e.g.*, *Lesslie* v. *Commissioner*, 36 T.C.M. 495 (1977) (contribution sent directly to Presbyterian missionary held deductible); *Winn* v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979) (contribution payable to Presbyterian missionary, delivered to missionary's father and deposited directly in missionary's account held deductible; *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982) (payments directly to third parties to reimburse them for expenses incurred while rendering services to various charities held deductible); *Archbold* v. *United States*, 444 F.2d 1120 (Ct. Cls. 1971) (legal fees paid by donor to prevent charity from misusing donated property held deductible).

2. The Ninth Circuit not only decided the question presented in a manner fundamentally at odds with decisions in other circuits; it also decided that question incorrectly. The decision is incorrect for at least two reasons:

First, the Ninth Circuit's adoption of an "actual control" or possession test for deductibility contravenes the plain language of Section 170. As previously noted, the precise question of statutory interpretation in this litigation is whether the sum of payments made by the petitioners, at the request of and in full compliance with the program of the Church, constitutes a "gift or contribution to *or for the use of*" the Church within the meaning of Section 170. A plain reading of that language indicates that the class of deductible contributions is broader than the class of contributions that can be characterized as being made "to" the charitable organization.

Indeed, the legislative history of Section 170 reveals that this was precisely what Congress intended. The original wording of the contribution deduction statute provided a deduction only for contributions made "to" a qualified charitable organization. Relying upon that statutory language, an early Internal Revenue Service decision held that payments to a Community Chest were not

deductible because the contribution had not been paid directly "to" the qualifying charity. O.D. 699, 3 C.B. 187 (1920). In the wake of that decision, Congress modified the language of the statute by providing that gifts or contributions would be deductible if they were "to *or for the use of*" a charity. Revenue Act of 1921, Ch. 136, § 214(a)(11), 42 Stat. 227 (1921). Thus, the legislative history of Section 170 confirms what is clear from the provision's language: that the phrase "or for the use of" means something; that is, it describes a class of contributions separate and distinct from contributions made directly "to" a charitable organization.

The Ninth Circuit's decision, however, eviscerates the statutory language. The Ninth Circuit's requirement that the Church have possession or "actual control" of the contribution represents, in reality, a requirement that the contribution be made "to" the Church itself. Obviously, the Church obtains possession of a contribution only if the donor makes the contribution directly "to" the Church rather than to someone else. The Ninth Circuit's decision, therefore, effectively and improperly eliminates "or for the use of" from the statute. Cf. 2A *Sutherland Statutory Construction* § 46.06 (1984); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). The decisions in *White* and *Brinley*, by contrast, are consistent with the plain language of Section 170 because they give congressionally intended independent effect to the "or for the use of" clause.

Second, the decision below conflicts with the controlling reasoning of a prior decision of this Court. In *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), this Court held that for purposes of determining whether a transfer was a "gift" within the meaning of Section 102 (exclusion of gifts from income), Congress adopted a nontechnical standard based upon the donor's intent:

> [T]he proper criterion established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think it profitable to go.

363 U.S. at 286. It has long been settled that the term, "contribution" in Section 170 has the same meaning as the term "gift" in Section 102. See *DeJong* v. *Commissioner*, 309 F.2d 373, 376 (9th Cir. 1962).

Accordingly, since *Duberstein*, the federal appellate courts have acknowledged that the considerations articulated in that decision also apply in interpreting the phrase "gift or contribution" in Section 170. In *White* v. *United States*, for example, the Tenth Circuit reasoned:

> [T]he Courts have focused on whether the donor's intent was charitable, *see Dowell v. United States*, 553 F.2d 1233, 1238 (10th Cir. 1977), and whether the primary purpose of the expenditure was to further the aims of the charitable organization or to benefit the spender.
>
> * * * *
>
> [T]he proper test, we hold, is . . . whether the primary purpose is to further the aims of the charitable organization or to benefit the person whose expenses are being paid. When the payment is for part of the costs of necessary travel and for all of the living expenses of a dependent member of taxpayer's household serving as a full-time Church missionary away from home we have no difficulty concluding that the expenditure is deductible because the expenditure primarily serves the Church.

725 F.2d at 1272. In adopting a technical "physical control" test without regard to petitioners' unquestioned purpose in making the contributions, the Ninth Circuit ignored the clear teaching of *Duberstein*.

The Ninth Circuit's misguided interpretation of Section 170 is an additional reason supporting a grant of certiorari in this case. This Court should reverse the Ninth Circuit's decision and adopt the tax rule articu-

lated by the Fifth and Tenth Circuits in *Brinley* and *White*.

3. Finally, the decision below affects a large number of taxpayers living within the Ninth Circuit and imposes a heavy burden on the Church's ability effectively to pursue its missionary goals. Obviously, the most immediate impact of the decision below falls upon the thousands of Church members within the Ninth Circuit who, at the request of the Church, have sent, or will send, contributions directly to the Church's missionaries. Those members will not be able to claim (or retain) deductions for such contributions.

But the Ninth Circuit's decision, if allowed to stand, will have more serious long-term consequences for the Church and its members. As a result of that decision, none of the more than 1.6 million Church members living within the Ninth Circuit will be able to claim any deductions for missionary contributions in the future unless the Church maintains a system for collecting and then redistributing missionary donations. This not only creates heavy administrative burdens for a Church that relies almost entirely upon its laity to administer the affairs of its local congregations; it also impedes the Church's efforts, through its missionary program, to teach its members and missionaries the principle of sacrifice. By requiring the Church to maintain such a system in order for the benefactors of its missionary program to qualify for tax deductions, the decision below forces the Church and its members to choose between those deductions and the religious benefits arising from direct transmittal of missionary contributions—benefits which rest on a historical tradition reaching back to the beginnings of the Church itself.

* * *

In sum, the decision of the Ninth Circuit creates a square and acknowledged conflict in the circuits and departs from both the plain language of the statute and prior decisions of this Court. The decision thereby creates inconsistency and uncertainty in the application of federal tax law in an area of national importance. It also imposes significant burdens upon the Church and millions of its members living within the Ninth Circuit. Accordingly, this case presents a substantial question of federal law that merits the Court's attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 19, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 87-4170

HAROLD DAVIS AND ENID DAVIS,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Argued and Submitted Oct. 4, 1988
Decided Nov. 14, 1988
As Amended Feb. 21, 1989

Wilford W. Kirton, Jr., Kirton, McConkie & Bushnell, Salt Lake City, Utah, for plaintiffs-appellants.

Francis M. Allegra, Dept. of Justice, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the District of Idaho.

Before BROWNING, BRUNETTI and TROTT, Circuit Judges.

BRUNETTI, Circuit Judge:

INTRODUCTION

This matter is before the court following the district court's granting of summary judgment in favor of the United States, *Davis v. United States*, 664 F.Supp. 468 (D. Idaho 1987). Plaintiff-appellants Harold and Enid

Davis claimed charitable deductions under Internal Revenue Code Section 170 for funds they sent to their two sons for their support while they served as fulltime unpaid missionaries for the Church of Jesus Christ of Latter-Day-Saints ("Church"), Benjamin Davis at the New York City Mission and Cecil Davis at the New Zealand/Cook Islands Mission. These deductions were disallowed by the Internal Revenue Service and the appellants initiated the present refund suit. The district court determined that (1) these funds were not deductible as "unreimbursed expenses" because such expenses may be deducted only by the individual performing services while "away from home," and only if the primary motive in performing the services was to benefit the charity, and (2) that they were not deductible as charitable contributions because the Church did not exercise sufficient control over the disposition of the funds.

We have jurisdiction pursuant to 28 U.S.C. Sec. 1291 and affirm.

BACKGROUND

A primary activity of the Church is its worldwide missionary program. Over 25,000 individuals have participated annually since 1977. Missionaries typically serve the Church for two years at a location assigned by the Church. Missionary work is uncompensated, but the Church will pay mission-related expenses if the missionary is unable to support himself or obtain the necessary funds from his family. Most missionaries are between the ages of nineteen and twenty-two; many receive payments from their parents to defray their living expenses. After an individual is "called" by the Church to serve as a missionary the Church advises parents of the amount for the missionary's support and requests their assistance.

The life of a missionary is closely supervised by the Church. Benjamin and Cecil were expected to conform to a schedule that regulated most of their waking hours. Both missionaries claim to have devoted over seventy-five hours per week to missionary work and religious study. Mission rules prohibit missionaries from dating, attending movies or plays, or engaging in various sports or other activities. Missionaries are required to submit weekly reports to their Mission President detailing the amount of time spent in Church service and explaining their expenses for the week. The Missionary Handbook contains the following admonition to missionaries: "The money received for your support is sacred and should be spent wisely and only for necessary work. Keep expenses at a minimum. . . . Keep financial records of all expenditures."

The Church gives several reasons for its preference not to collect and distribute contributions for the support of its missionaries. First, the Church feels that direct contributions to missionaries foster the Church doctrine of sacrifice and consecration. Second, the Church believes that direct transmittal promotes frugality by missionaries because of their awareness of the personal sacrifices that are being made on their behalf. Third, direct transmittal of contributions reduces the administrative and bookkeeping expenses that would otherwise be imposed on the Church.

The appellants' sons, Benjamin and Cecil, both volunteered for, and were "called" by the Church to serve as missionaries when they became nineteen years old. During 1980 and 1981 the appellants transferred $3480.89 and $4135.00 to Benjamin's checking account. Except for approximately $20 per month, which was used to purchase religious materials, Benjamin used this money primarily for living expenses. During 1981 appellants transferred $1518.00 to Cecil's checking account. Cecil also used this money primarily to pay his living expenses.

At the end of his missionary service, Cecil had no unexpended funds. Benjamin had unexpended funds with which he purchased a camera. The appellants filed two amended tax returns for 1980 and 1981; the first claiming as charitable contributions the full amounts they sent to their sons, and the second reducing this amount to what has been requested by the Church and disclaiming their sons as dependents.

The appellants attempted to characterize their deductions as unreimbursed expenses incurred in charitable service or, in the alternative, as charitable contributions. The district court refused to consider the claimed deductions as unreimbursed expenses because they were incurred by a person other than the taxpayer, *Davis*, 664 F. Supp. at 471-72. In determining whether the deductions could be characterized as charitable contributions the district court applied a "control" test, which considers whether the charitable organization exercises control over the use of the funds. Concluding that the missionaries, rather than the Church, controlled the disposition of the funds, the district court held that the deductions were properly disallowed by the Internal Revenue Service. *Id.* at 472. Thus, the Government's motion for summary judgment was granted.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986) (citing *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983)); *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring*, 783 F.2d at 876. The appellate court must determine, viewing the evidence in a light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.

Ashton, 780 F.2d at 818. *See also Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). Because the material facts are not in dispute, our inquiry is limited to the district court's application of the substantive law.

DISCUSSION

A. *Applicable Law*

We take judicial notice of the fact that the Church is a qualified religious organization to which deductible contributions can be made. Internal Revenue Service Publication No. 78, *Cumulative List of Organizations* 216 (1984).

26 U.S.C. Sec. 170: Section 170 of the Internal Revenue Code, 26 U.S.C., provides in part:

> (a) *Allowance of deduction.*—
>
> (1) *General Rule.*—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary.
>
> . . . .
>
> (c) *Charitable contribution defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
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> . . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation—
>
> . . . .
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . .

Treas. Reg. 1.170A-1(g): Title 26 C.F.R. Section 1.170A-1(g) provides:

> *Contributions of services.* No deduction is allowable under Section 170 for a contribution of services. However, unreimbursed expenditures made incident to rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible.

From the foregoing statutes it is apparent that expenditures may be deductible under two approaches. First, under Section 170, deductions are allowed for charitable contributions made "to or for the use of" qualified organizations. The requisite elements are (1) that the transfer of property is made with no expectation of a quid pro quo, (2) that it is made to a qualified recipient, and (3) that it is made "to or for the use of" the qualified recipient. *See Smith v. Commissioner*, 800 F.2d 930, 934 (9th Cir.1986); *Allen v. United States*, 541 F.2d 786, 788 (9th Cir.1976). Second, under Treas.Reg. 1.170A-1(g), expenditures related to the contribution of services are deductible as "unreimbursed expenses made incident to the rendition of services" to a qualified organization. The appellants argue that the payments they made to their sons were "for the use of" the Church and therefore deductible as charitable contribution, or, in the alternative, that they are deductible as unreimbursed expenditures made in connection with the contribution of services to the Church. The government argues that the expenditures were not charitable contributions because they were never within the physical control of the Church, and that they were not unreimbursed expenses because the individual claiming the deduction did not perform the services.

B. *Charitable Contributions*

In situations where a taxpayer has claimed a charitable deduction for funds that have been earmarked for a specific individual, courts have considered whether the charity exercises control over the use of the funds. *See Winn v. Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979) (church sponsored fund raiser to collect funds as part of its work, [church] officer took the funds donated and dealt with them as the church wished, and funds went to support the work the church intended, is sufficient to establish funds were donated "for the use" of the church); *Peace v. Commissioner*, 43 T.C. 1, 7-8 (1964) ("Contributions to mission earmarked for specific individuals deductible because the mission had exclusive control, under its own policy, over funds and taxpayer's designation of specific individuals only manifested a desire to have the donations credited to the support of those individuals."); *see also Tripp v. Commissioner*, 337 F.2d 432, 436 (7th Cir.1964) (payments earmarked for the educational expenses of a particular individual not deductible because they were not made "to a general scholarship fund to be used as the college saw fit").

The appellants assert that because their contributions conferred a benefit on the Church they should qualify as charitable contributions. They claim that actual control by the charity is a factor to be considered, but should not be required in all cases. Rather, the appellants urge, the test of deductibility should turn on whether the contributions stem from a charitable intent on the part of the donor. The government responds that the plain wording of Section 170 precludes this construction and that the deduction should be disallowed because the contributions were received directly by the missionaries from the taxpayer (parents) and were neither to nor for the use of the Church. The government also argues that a charitable intent can only exist where the contribution is based on a "detached and disinterested generosity," *see Com-*

missioner v. Duberstein, 363 U.S. 278, 285, 80 S.Ct. 1190, 1197, 4 L.Ed.2d 1218 (1960) (internal quotation omitted), that was absent in this case because the donors received a quid pro quo—the assurance that the family member who was serving as a missionary would be properly clothed, housed, and fed. *Cf. DeJong v. Commissioner*, 369 F.2d 373, 376 (9th Cir.1962) (money spent toward the education of a specific child is a family expense and therefore is not deductible as a charitable contribution to the school).

The Tenth Circuit addressed this issue in *White v. United States*, 725 F.2d 1269 (10th Cir.1984) in a factual setting indistinguishable from the one at bar. The government in *White* urged the court to adopt the control test that was first applied by the Tax Court in *Peace v. Commissioner*, 43 T.C. at 7-8. In *Peace*, the taxpayers sent checks to the Sudan Interior Mission, which were deposited by the Mission into a common pool from which all missionaries received their support. *Id.* at 7. The *Peace* court found it critical that donations were deposited in a common pool and disbursed only as the mission determined, despite specific directives by the donors. *Id.* at 8. *See also* Rev.Rul. 62-113, 1962-2 C.B. 10 ("The test in each case is whether the organization has full control of the donated funds as to their use, so as to insure that they will be used to carry out its functions and purposes."). The *White* court rejected the control test and held that the proper test of deductibility is "whether the primary purpose [of the contribution] is to further the aims of the charitable organization or to benefit the person whose expenses are being paid." *White*, 725 F.2d at 1271-72. Applying this "primary purpose" test, the court determined that payment for the support of a full-time missionary who was away from home primarily served the goals of the Church rather than the missionary and was therefore deductible. *Id. See also Brinley v. Commissioner*, 782 F.2d 1326, 1330-32 (5th Cir.1986) (Control is a "legitimate gauge" in determining deductibility, but the standard is whether the charitable work is the cause of the payment, and causation is established when the charity is the primary beneficiary of the gift.).

With the exceptions of the Tenth Circuit in *White* and the Fifth Circuit in *Brinley*, however, courts have employed the primary purpose test only in those instances in which the taxpayer has sought a charitable deduction for his own expenses. *See Brinley*, 782 F.2d at 1338 (Hill, J., dissenting). We decline to apply the primary purpose test here. The better reasoned approach, we feel, is to require that the recipient charity have control over the donated funds. The control gauge stems from the basic requirement that the beneficiary of a charitable contribution must be indefinite. *See Russell v. Allen*, 107 U.S. 163, 167, 2 S.Ct. 327, 330, 27 L.Ed. 397 (1883). When a taxpayer intends a contribution for a specific purpose, or even a specific individual, but the charity retains control over the funds, this requirement is satisfied. But when a taxpayer makes a contribution directly to the intended beneficiary so that the charity never possesses the funds, let alone controls their use, there can be no guarantee that the beneficiary will be indefinite. *See Barry's Estate v. Commissioner*, 311 F.2d 681 (9th Cir.1982) (property bequeathed to member of Jesuit Order, as opposed to Order itself, not deductible though legatee obligated by Canon law to transfer property acquired to the Order; court noted possibility that legatee could leave the Order). Here the charity lacked actual control over the funds. Contributions were deposited directly into the personal checking accounts of the taxpayers' sons. While the Church admonished the missionaries to spend their money wisely, the particular use to which the funds were put was solely within the control of the missionaries. Any surplus received by the missionaries was theirs to keep, and other than requiring the missionaries to submit weekly reports of their expenses, the Church had no discretion over the disposition of the funds.

C. *Unreimbursed Expenses*

Regarding deductions that are claimed for unreimbursed expenses, we apply a "primary benefit" test: the expenditure is deductible only if the charity, rather than the taxpayer, receives the primary benefit of the expenditure. *See Babilonia v. Commissioner*, 681 F.2d 678, 679 (9th Cir.1982). We have not previously considered the deductibility of expenses incurred by an individual other than the taxpayer. The appellants argue that the district court erred in concluding that Treas. Reg. 1.170A-1(g) was applicable only to the individual actually performing the services. Rather, the appellants urge the panel to construe the statutes liberally and follow the *White* court, which declared, "We see no rational basis for distinguishing the payment of the expenses of a dependent son from the payment of a taxpayer's own expenses to perform the same services." *White*, 725 F.2d at 1271.

The government responds that there is a legitimate basis for distinguishing between the individual who performs the services and the one who claims the deduction: while in theory there may be no difference between deducting amounts paid to a missionary for his Church-related expenses and paying the Church the same amount in the form of a deductible contribution, in practice a significant burden will be imposed on the Tax Service to prevent taxpayer abuses from this activity. Two specific types of abuses are feared by the government. First, parents in high tax brackets could contribute large amounts to their children, who they would be supporting anyway had they not undertaken a mission, and claim the amount was contributed to support charitable activity. The parents could then deduct an amount well in excess of what the charity would have paid the children for the same services. Moreover, deductions properly claimed by low tax bracket missionaries would shift to donees in higher tax brackets. These potential abuses would force

the IRS to investigate the reasonableness of all direct contributions to missionaries. On the other hand, the government argues, if the money were required to first go to a charity, the possibility that excessive contributions would benefit the missionary rather than the charity would be greatly reduced. *See Brinley v. Commissioner*, 782 F.2d 1326, 1338 (5th Cir.1986) (Hill, J., dissenting).

Second, the government points out, double deductions could occur for the same expenditure: one by the donor and another by the missionary. While this specific wrongdoing is not alleged in the present case, it is a legitimate concern. We note, and find it troubling, that the Davises filed an amended United States individual income tax return, Form 1040X, for the years 1980 and 1981 claiming personal exemptions for their sons as dependents while at the same time claiming a charitable deduction for all the funds they paid to their sons for their support while serving as missionaries. When the IRS disallowed the claims, the Davises filed a suit for refund. Thereafter, the Davises filed a second set of amended returns limiting the amount of their claimed charitable deductions to the amounts the church established as the range of expenses for each mission and did not list Benjamin and Cecil as dependents. The first amended return illustrates the potenial for double deductions that, while perhaps unintentional, nevertheless would deprive the government of revenue.

Other courts have concluded that in certain situations the taxpayer will be allowed a deduction for the unreimbursed expenses of a family member that are incurred in charitable work, and the Fifth Circuit has directly addressed the issue of unreimbursed expenses of Mormon missionaries. In *Brinley v. Commissioner*, 782 F.2d 1326 (5th Cir.1986), the court rejected the decisiveness of the *White* "primary purpose" test and applied a different test to allow a portion of the claimed deduction. The *Brinley* court chose to characterize the expenditures as unreim-

bursed expenses rather than charitable contributions, and applied a "causation" test, holding that "[t]he charitable work must be the cause of the payment in order for the payment to be deductible." *Id.* at 1331 (quoting *Orr v. United States*, 343 F.2d 553, 557 (5th Cir.1965)). *See also McCollum v. Commissioner*, 37 T.C.M. (C.C.H.) 1817, 1819-21 [available on WESTLAW, 1978 WL 3101] (1978) (taxpayer allowed a deduction for the expenses that he and his family members incurred in connection with their services to the National Ski Patrol, a qualified charitable organization).

Significantly narrowing the scope of the deduction that was allowed in *White*, the *Brinley* court further determined that the missionary's tax home was where he was serving the Church, thereby precluding deductions for food and lodging expenses by either the parents or the missionary himself. A deduction was allowed only for those expenditures that primarily benefited the charity, i.e., proselytizing and out-of-pocket transportation expenses incurred by the missionary in the performance of his work. *Id.* at 1332.[1]

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[1] The determination of whether a taxpayer is away from home for tax purposes "is essentially a question of fact." *Frank v. United States*, 577 F.2d 93, 97 (9th Cir. 1978) (citing *Curtis v. Commissioner*, 449 F.2d 225, 227 (5th Cir. 1971)). "Away from home," for the purposes of Section 170, is the same as under Section 162, which allows a deduction for all "ordinary and necessary expenses paid or incurred during the taxable year . . . while away from home in pursuit of a trade or business." In the context of business deductions, a taxpayer's home is his principal place of business. *Wills v. Commissioner*, 411 F.2d 537, 540 (9th Cir. 1969). A taxpayer will be deemed to be away from home if he is on an assignment that will terminate within a reasonably short period of time. *Harvey v. Commissioner*, 283 F.2d 491, 495 (9th Cir. 1960) ("[a]n employee might be said to change his tax home if there is a reasonable probability . . . that he may be employed for a long period of time at his new station. . . . On the other hand, if it is very likely that taxpayer's stay away from home will be short; then it seems quite unreasonable to expect him to move his domicile. . . ."). *See also*

We do not read Treas.Reg. 1.170A-1(g) as permitting a deduction for unreimbursed expenses by anyone other than the taxpayer that actually performs the charitable service. Congressional interpretations of this section of this regulation supports our conclusion. As part of the Tax Reform Act of 1986, the House Ways and Means Committee made the following observation regarding Treas.Reg. 1.170A-1(g): "A taxpayer may deduct, as charitable deductions, unreimbursed out-of-pocket expenses incurred incident to the rendition of services *provided by the taxpayer* to a charitable organization." H.R.Rep. No. 99-426, 99th Cong., 1st Sess. 119 (1985) (emphasis added). Similarly, the Joint Committee on Taxation's *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, 98th Cong., 2d Sess. at 1133 (1984) (emphasis added) provides: "Unreimbursed out-of-pocket expenses *incurred by the taxpayer* in rendering services to an organization . . . are eligible for deduction as charitable contributions . . . ." It is a fundamental principle of tax law that assignments of deductions are prohibited. *See New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440-41, 54 S.Ct.

Peurifoy v. Commissioner, 358 U.S. 59, 60, 79 S.Ct. 104, 105, 3 L.Ed.2d 30 (1958) (deduction allowed if employment is "temporary" as contrasted with "indefinite" or "indeterminate").

Thus, a temporary assignment of "short" duration will not require the taxpayer to relocate his tax home. Missionaries typically serve the Church for a two year period. The Tax Service has taken the position that temporary assignments expected to last one year or less will be considered under all the facts and circumstances, that stays of more than one year but less than two will be given a rebuttable presumption that the stay is indefinite, and that an expected or actual stay of two years or more will be considered indefinite and nondeductible regardless of the circumstances. Rev. Rul. 83-82, 1983-1 C.B. 45.

Because we hold that unreimbursed expenses are not deductible by a taxpayer who does not actually render the charitable service, we need not and do not answer the question of whether a missionary is "away from home" for tax purposes.

788, 791, 78 L.Ed. 1348 (1934) ("taxpayer who sustain[s] the loss is the one to whom the deduction shall be allowed"), yet this is exactly what the appellants are attempting.

The appellants rely primarily on *McCollum v. Commissioner*, 37 T.C.M. (C.C.H.) 1817 (1978) and *Rockefeller v. Commissioner*, 676 F.2d 35 (2d Cir.1982), for support for their contention that expenses need not always be incurred by the individual claiming the deduction, but their reliance is misplaced In *McCollum* the taxpayers, husband and wife, and two of their children served on the National Ski Patrol, and were allowed a charitable deduction for the expenses incurred by the family while rendering their services to the National Ski Patrol. In *Rockefeller* the taxpayers employed both their personal staffs and staff of the Rockefeller Family Joint Office in conducting their philanthropic affairs. The Rockefellers deducted as charitable contributions the salaries of the personal and Joint Office employees, as well as travel, entertainment and other expenses incurred by the taxpayers and their employees in connection with their philanthropic activities. Unlike the situation in the present case, the deductions claimed in *McCollum* and by the Rockefellers were for unreimbursed expenses incurred by the taxpayers in rendering services to charities. *Rockefeller*, 676 F.2d at 41-42. In this case the missionary sons were acting independently of their parents and the parents were not rendering their services to the church. We hold that the taxpayer appellants may not deduct the funds they paid to their sons as unreimbursed expenses because the taxpayers were not engaged in charitable service.

CONCLUSION

Public policy demands that statutes governing the deductibility of charitable contributions be given a broad construction, *e.g.*, *Helvering v. Bliss*, 293 U.S. 144, 150-51, 55 S.Ct. 17, 20, 79 L.Ed. 246 (1934), and the general rule of construction is that tax provisions should be construed wherever possible in favor of the taxpayers. *E.g. Burnet v. Niagara Falls Brewing Co.*, 282 U.S. 648, 654, 51 S.Ct. 262, 265, 75 L.Ed. 594 (1931). The statutory system, however, does not provide for a deduction by a taxpayer who does not actually render service to the charity or make a contribution directly to the charity. Even the most liberal of constructions does not mean that statutory words and phrases are to be given meanings unjustified by legislative intent or that express limitations are to be ignored. *Better Business Bureau v. United States*, 326 U.S. 279, 283, 66 S.Ct. 112, 114, 90 L.Ed. 67 (1945). We do not question the high ideals of the Church or the valuable services it performs in connection with its missionary program. We are constrained by the law, however, and it is up to the legislature to provide the remedy that is sought by the appellants. The decision of the lower court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
D. IDAHO

Civ. No. 85-4106

HAROLD DAVIS AND ENID DAVIS,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

July 15, 1987

Bart M. Davis, Weinpel, Woolf, Just, Combo & Davis, Idaho Falls, Idaho, Wilford W. Kirton, Jr., Raeburn G. Kennard, Robert P. Lunt, Kirton, McConkie & Bushnell, Salt Lake City, Utah, for plaintiffs.

Maurice O. Ellsworth, U.S. Atty., D. Idaho, F. Michael Kovach, Jr., Trial Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION AND ORDER

RYAN, District Judge.

I. INTRODUCTION

This matter is before the court on cross-motions for summary judgment by the United States and Harold and Enid Davis. This action stems from the Internal

Revenue Service's (IRS) denial of the plaintiffs' claim for charitable contributions based upon expenses they paid for their sons during the sons' missionary service for the Church of Jesus Christ of Latter Day Saints (Mormon Church).

Factual Background

Plaintiffs seek refund of federal income taxes paid for taxable years 1980 and 1981 in the amounts of $1,779.71 and $2,613.10, respectively. These refund claims are based on the plaintiff's claim that the funds they sent to their sons while the sons served as missionaries of the Mormon Church qualify as charitable contributions which are deductible under Section 170 of the Internal Revenue Code of 1954.

Plaintiffs have two sons, Benjamin and Cecil, who were raised as members of the church. In 1979, Benjamin was chosen as a missionary by church officials and notified that he would serve his mission duty in New York. During 1980 and 1981, plaintiffs transferred to Benjamin's personal checking account $3,480.89 and $4,135.00. Benjamin used these moneys to pay for rent, food and transportation while he was on mission. Benjamin also spent approximately $20.00 per month to purchase religious tracts and other materials used in his missionary work. At no time during his mission service did Benjamin receive charitable contributions from third parties which he accepted on behalf of the church and deposited into a church-controlled bank account. Moreover, Benjamin was not required to turn over to the church the funds in his personal account not expended by him when he terminated his mission and returned to Utah. Benjamin had no unexpended funds when he terminated his mission service.

In 1980, Cecil Davis applied to become a missionary for the Mormon Church. Cecil was notified in 1981 that he had been called to missionary service and began serv-

ing his mission in New Zealand. During 1981, plaintiffs transferred to Cecil's personal checking account $1,518.00. Cecil primarily used this money to pay for rent, food and transportation and personal needs while he was on his mission. Cecil spent nothing for religious tracts or materials. As with Benjamin, Cecil never received charitable contributions from third parties which he accepted on behalf of the church and deposited into a church-controlled bank account or did he turn over any of his unexpended funds to the church following termination of his mission.

On April 16, 1984, plaintiffs filed with the Ogden Service Center an amended United States individual income tax return Form 1040X for the years 1980 and 1981, claiming as additional charitable contributions $3,480.39 and $4,882.00 which they paid to their sons during the sons' missionary service. On January 30, 1985, the Service Center advised plaintiffs that no refunds would be granted. Plaintiffs' attorney requested that the claims be disallowed so that this suit could be filed. This was done on April 12, 1985. In September of 1986, plaintiffs filed a second set of amended returns limiting their charitable deductions to the amounts "requested" by the church and correcting the number of dependents claimed for each year.

II. LEGAL ANALYSIS

The federal regulations pertinent to this action are set forth at 26 U.S.C. § 170 and 26 C.F.R. § 1.170A-1. Section 170 of the Internal Revenue Code provides, in part:

> (1) General Rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary . . .
>
> . . . .

> (c) Charitable contribution defined. For the purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
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> . . . .
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> (2) A corporation, trust, or community chest, fund or foundation—
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> . . . .
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . .

26 U.S.C.S. § 170 (1974). The Mormon church is an organization listed on the Internal Revenue Service Publication No. 78, Cumulative List of Organizations, contributions to which are deductible under Section 170.

Title 26 C.F.R. § 1.170A-1, provides in part:

> (a) *Allowance of deduction.* Any charitable contribution, as defined in section 170(c), actually paid during the taxable year is allowable as a deduction in computing taxable income irrespective of the method of accounting employed or of the date on which the contribution is pledged. . . .
>
> . . . .
>
> (g) *Contributions of services.* No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. *Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated serv-*

> *ices also are deductible.* For the purposes of this paragraph, the phrase "while away from home" has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder. . . . (emphasis added)

Thus, under the applicable provisions of the revenue code and treasury regulations, a taxpayer is permitted to deduct as a charitable contribution payments made "to or for the use of" a qualified charity. This includes "unreimbursed expenditures" which are incurred by the taxpayer while providing services to the particular charity.

Plaintiffs argue, in support of their motion, that the payments they made to support their sons' missionary services were payments "for the use of" the church as set forth in 26 U.S.C. § 170. It is further asserted that those payments qualify as "reasonable expenditures" incurred while providing services to the church.

The position taken by the plaintiffs finds support in two recent federal court opinions from the Tenth and Fifth Circuits. In *White v. United States*, 725 F.2d 1269 (10th Cir.1984), parents of a 19-year-old missionary serving the Mormon Church claimed an income tax deduction under Treasury Regulation 1.170A-1(g) for expenditures they made at the request of the Mormon Church to support their son's missionary work. The Tenth Circuit, in rejecting the government's argument that the church itself must have control over the expenditure of the funds if the donor is to receive the deduction, applied a "primary benefit" test. That is, the court focused on whether the donor's intent was charitable and whether the primary purpose of the expenditure was to further the aims of the charitable organization or simply to benefit the spender. Based upon this test, the court found that when payments by parents are made for part of the costs of necessary travel and for all of the living expenses of a dependent member of the taxpayer's household serving as a full-time church missionary away from home, that the expenditure was deductible because the expenditure primarily served the church.

In *Brinley v. Commissioner of Internal Revenue*, 782 F.2d 1326 (5th Cir.1986), the Fifth Circuit held that the test of whether a parent's contribution to their son's missionary service was deductible was a test of causation; that is, whether the charitable work was the cause of the payment. Under this test, the burden would be on the taxpayer to show that a particular payment primarily benefited a charitable organization and did not simply benefit a particular individual. The court went on to hold that "nothing on the face of § 1.170A-1(g) . . . limit[ed] deductions for expenditures incurred in the rendition of charitable work *to the person who actually performs the service.*" *Id.* at 1332 (emphasis added).

This court, of course, is not bound by the rulings of the Tenth and Fifth Circuits. The Ninth Circuit has had an opportunity to set forth the legal standard that will be applied in determining what is a charitable contribution pursuant to 26 C.F.R. § 1.170A-1(g). In *Babilonia v. Commissioner of Internal Revenue*, 681 F.2d 678 (9th Cir.1982), the circuit applied the "intent" or "motive" test that was set forth in the *White* decision; that is, was the taxpayer's primary motive in performing services to advance personal interest or to advance those of the charitable organization? However, there is an important factual distinction between the *Babilonia* decision and the *White* and *Brinley* decisions. In *Babilonia*, the taxpayers were seeking a charitable deduction pursuant to 26 C.F.R. § 1.170A-1(g) for expenses they personally incurred while performing services for a charity and not for expenses of a third party as in the *White* and *Brinley* cases.

The position of the government is that the primary benefit test is inapplicable in this case because plaintiffs' payments are to third parties. In his dissent in the *Brinley* decision, Judge Robert Hill noted that:

> "With the exception of the majority's opinion [in *Brinley*] and that of the Tenth Circuit in *White*, the case law, including this circuit, has consistently employed the primary benefit test only in those instances where the taxpayer has sought a charitable deduction for his own expenses. . . . *See e.g., Babilonia v. Commissioner*, 681 F.2d 678, 679 (9th Cir. 1982); *Sheffels v. United States*, 264 F.Supp. 85, 89 (E.D.Wash.1967), *aff'd*, 405 F.2d 924 (9th Cir. 1969); *Orr v. United States*, 343 F.2d 553, 557 (5th Cir. 1965). . . ."

Brinley v. Commissioner, 782 F.2d at 1338 (footnote and citations omitted).

Indeed, while Section 1.170A-1(g) does not "expressly" limit deductions for expenditures incurred in the rendition of charitable work to the person actually performing the service, such a limitation is implicit in the language of the regulation. The only individuals who performed donated services "away from home" were the missionary sons, not the parents. This court should not stray from the clear language of the regulation to permit taxpayers, who are not performing the donated services away from home, to claim a charitable deduction pursuant to 26 C.F.R. § 1.170A-1(g).

As noted by Judge Hill in his dissent in *Brinley*, application of the primary benefits test to expenses incurred by an individual *other* than the taxpayer creates incentives for taxpayer abuse. The dissent set forth the following analysis:

> [W]hen the taxpayer deducts another person's expenses, a shifting of deductions occurs that does not occur when the taxpayer deducts his own expenses. Taxpayer parents in high income tax brackets may be tempted to shift their lower income bracket children's deductions to themselves. Without the oversight of the charitable organization, parents could

> contribute larger than necessary amounts to their missionary child and claim the money was contributed to support charitable activities. If a donor can contribute directly to the missionary, the IRS will be forced to investigate the adequacy of the organizational oversight provided by the charity; this places a heavy burden on an already overwhelmed IRS facing reduced investigatory resources. However, if the money must first go to the charity, the charity will see that the money is spent for the benefit of the charity and not an overcontribution for the child's benefit. . . .
>
> [T]he use of the primary benefit test also causes an increased chance of improper double deductions. Both the donor patient [sic] and the missionary child may attempt to deduct the expenses incurred by the child. However, if the money is given to the Church, this potential problem is avoided because the missionary cannot take the deduction since the expenses will not be unreimbursed. Under the majority's position, the IRS will be forced to compare the tax returns of parent sand missionary children to determine if double deductions are impermissibly occurring.

Brinley v. Commissioner, 782 F.2d at 1338.

This court agrees with the *Brinley* dissent that the primary benefit test is not the appropriate test to be applied when a taxpayer attempts to deduct expenses incurred by another. It applies only in those situations where the taxpayer seeks a charitable deduction for his own expenses. The limitation of the primary benefit test to the above situation not only comports with the language of 26 C.F.R. § 1.170A-1(g), but will also serve to prevent the potential taxpayer abuses discussed above.

The appropriate test to be applied when a taxpayer asserts that he has made a payment to another individual

"for the use of" the charitable organization is the control test. *See Winn v. Commissioner*, 595 F.2d 1060 (5th Cir. 1979); *Tripp v. Commissioner*, 337 F.2d 432 (7th Cir. 1964); *Peace v. Commissioner*, 43 T.C. 1 (1964); *Thomason v. Commissioner*, 2 T.C. 441 (1943). Under this test, a donation is "for the use" of the charitable organization when the charity has sufficient possession of the contribution so that it has discretion as to the use to which the donated funds will be put.

In the instant case, it is clear that the missionary sons had true "control" over the funds in question. There was no common pool from which disbursements were made to the Davis boys by the church. Contributions were placed directly in the sons' personal checking accounts by their parents. The particular use to which the funds were put was solely within the power of the missionary. The sons did not have to account for any surplus funds they might receive from their parents or other parties, nor were they required to turn over to the church funds in their personal accounts not expended when the mission was terminated. It appears from the record before the court that the only role the church played in the distribution of the funds to the missionaries was to provide a projected budget range that would be needed for the particular area in which the missionary would be serving. Beyond that information provided by the church, there is no indication that the church was involved in any way in controlling how the missionary's money was spent.

Conclusion

In summary, the court finds that the plaintiffs cannot deduct as "unreimbursed expenses" payments made to their sons while the sons were serving on a Mormon mission. Such unreimbursed expenses may be deducted only by the individual "performing services away from home." Moreover, the taxpayer actually incurrng the expenses must demonstrate that his primary motive in

performing the services was to benefit the charity. *Babilonia v. Commissioner*, 681 F.2d at 679. When a taxpayer asserts that a contribution benefiting a specific individual qualifies as a contribution made "for the use of" a charitable organization, the control test applies. A charity has "control" over a contribution when it has complete discretion as to how those funds will be used. For the reasons stated in this opinion, plaintiffs cannot properly claim a deduction under 26 U.S.C. § 170 or 26 C.F.R. § 1.170-1(g).

III. ORDER

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that plaintiffs' Cross Motion for Summary Judgment should be, and is hereby, DENIED. Judgment will enter accordingly.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Based upon this court's Memorandum Opinion and Order dated July 15, 1987, and the court being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing against the defendant and that this action be dismissed with prejudice.

DATED this 15 day of July, 1987.

/s/ Harold L. Ryan
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4170
D.C. No. CV-85-4106-HLR

HAROLD DAVIS; and ENID DAVIS,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

[Filed April 20, 1989]

BEFORE: BROWNING, BRUNETTI, and TROTT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106
Tax

HAROLD DAVIS and ENID DAVIS,
Plaintiffs

vs.

UNITED STATES OF AMERICA,
Defendant

AFFIDAVIT OF ELDER
ROBERT L. BACKMAN

STATE OF UTAH
COUNTY OF SALT LAKE ss

ELDER ROBERT L. BACKMAN, having been first duly sworn, deposes and says:

1. I am a member of the First Quorum of Seventy and the Executive Director of the Missionary Department of The Church of Jesus Christ of Latter-day Saints (the Church), which is located at the Church's headquarters in Salt Lake City, Utah. The First Quorum of the Seventy is an ecclesiastical group of Church leaders with general responsibility for the missionary program of the Church. I am authorized to make this affidavit on behalf of the Church, and I have personal knowledge of the matters set forth in this affidavit.

2. The President of the Church has characterized the missionary program as one of the three primary areas of Church activity.

3. Missionaries receive no compensation for their services, although the Church pays for mission-caused out-of-pocket expenses for food, lodging, transportation, religious materials or other mission-related expenses if the missionary does not pay for them himself or does not receive adequate funds directly from another donor in accordance with the Church's request and instructions.

4. A mission is not a prerequisite for any position which will provide income or financial remuneration, either inside or outside the Church. At most, a mission may improve the background of the missionary to serve in uncompensated lay ecclesiastical Church assignments, but it is not required for such assignments.

5. Most missionaries are individuals between the ages of nineteen and twenty-two years, many of whom receive the necessary funds to meet minimal mission expenses from their parents at the request of the Church. The Church advises the missionaries and the parents of the amounts which it believes necessary to obtain the missionary's services at the location in question.

6. The Church encourages every young man to make himself worthy for a mission, and every worthy young man is encouraged to be prepared to accept a mission call from the leadership of the Church when he reaches nineteen years of age.

7. The Church has strict standards for missionaries regarding moral worthiness, testimony, physical, mental and emotional fitness, willingness to obey Church authorities in all matters, desire to serve the Church and others, attitude towards the gospel, willingness to work, etc.

8. If the Church determines that a candidate is qualified to become a missionary, it will send a letter, bearing the signature of the President of the Church, calling the applicant to go on a mission for the Church and requesting the applicant to accept or reject the call in writing. This letter also informs the candidate of the geograph-

ical area where the Church has decided to send the missionary. A second letter from the Missionary Department will provide additional information, including the amount of money which will be needed to obtain the missionary's services.

9. If the candidate accepts the call, the candidate receives priesthood ordinances or blessings by which he is "set apart" to serve as an official missionary and minister of the Church.

10. The Mission President has virtually total control over each missionary's life, including the manner and style of dress, grooming, proselyting and study schedules, and use of time for other activities. Mission rules prohibit dating and certain sports and restrict attending movies, plays and other theatrical events. Other limitations are determined by the Mission President.

11. Missionaries (except for older couples operating under the supervision of the Mission President) are expected to conform to a daily schedule which calls for at least 10 hours per day of actual missionary work in addition to study time, meal time and planning time, as set out on pages 15 and 16 of the Missionary Handbook:

RECOMMENDED DAILY SCHEDULE

The recommended daily schedule is as follows:

6:30 a.m.	Arise
7:00 a.m.	Study Class
8:00 a.m.	Breakfast
8:30 a.m.	Personal Study
9:30 a.m.	Proselyte
12:00 p.m.	Lunch
1:00 p.m.	Proselyte
5:00 p.m.	Dinner
6:00 p.m.	Proselyte
9:30 p.m.	End proselyting—plan tomorrow's activities
10:30 p.m.	Retire—this is a must

12. The foregoing schedule is modified on Sundays to permit attendance at worship services. Once each week, missionaries are allowed up to eight hours for laundry, cleaning, writing home, filling out reports, necessary shopping, and limited recreation within mission rules and supervision. Missionaries are not permitted to take vacations or travel for non-mission purposes.

13. Since missionaries devote their full time to Church service, the expenses incurred incident to their services must be paid from savings or from contributions made by other members. Therefore, the Church actively solicits contributions to its missionary program from its members. Sacrifice for the support of the missionary program is expected not only from the missionary, but from each member of the Church.

14. If the missionary himself is unable to provide all of his own financing, it is the practice of the Church first to ask the missionary's family to contribute the necessary financing for his mission service. The amount requested varies with the costs of the mission area and is determined by the Church in order to encourage frugality by each missionary.

15. If the family is either unable or unwilling to contribute all (or any portion) of the funds necessary, the Church seeks donations from other ward or stake members, through priesthood quorums, or from other Church sources to obtain sufficient funds to pay costs not paid by the missionary himself.

16. If parents or any other individual member is paying the costs incident to a specific missionary's service, the Church prefers the donor to transfer the necessary funds to the personal checking account of the missionary unless a different method of transfer is requested by the Mission President in order to meet specific needs or problems in a local mission.

17. The Church believes that the direct transmittal of money to the missionary results in several specific and important benefits to the Church. In particular, the Church concludes that having the member donate money while the missionary donates service in order to carry out the work of the Lord (each being aware of the other's part) fosters the Church doctrine of sacrifice and consecration in the lives of its people. That doctrine, based on Church scripture, requires members to consecrate and dedicate themselves and their means to the work of the Lord. The Church has found that for parents to pay these contributions directly to the missionaries helps to strengthen and build the family, the primary unit of the Church and the gospel. The Church has also found that direct transmittal assists the Church in minimizing the expenses of its missionaries because the missionaries are more frugal when they are aware of the donor's personal sacrifice to assist in the Lord's missionary work. The Church finds that knowing who bears the financial burden helps remind the missionary that the mission is intended as a period of dedication, service and sacrifice and is not intended as a means of livelihood. Direct transmission of funds in the amounts requested by the Church also reduces the substantial administrative and bookkeeping requirements which would otherwise be imposed upon the Church, thereby preserving the Church's resources for additional charitable and religious activities, including missionary work itself.

18. Missionaries are not free to do whatever they like with the funds received for mission-related expenses. Although it is not practical for missionaries to obtain specific advance approval of each expenditure they make from their personal checking account, the limited amounts available effectively limit their expenditures to mission essentials. Furthermore, missionaries receive specific instructions with respect to the expenditures of these donated funds. For example, the Missionary Handbook provides:

> The money you receive for your support is sacred and should be spent wisely and only for missionary work. Keep expenses at a minimum. . . . Keep a financial record of all expenditures. (p. 29)

These restrictions are repeated in the instructions received at the Missionary Training Center in Provo, Utah and those given by Mission Presidents to the missionaries under their supervision.

19. The Church does not want missionaries to receive missionary expense money or other charitable contributions from third parties other than those (usually the family) whom the Church has requested to provide financial assistance.

20. The amount requested by the Church for each individual missionary varies according to the amount determined to be necessary in the specific mission to which the missionary has been called. This amount is determined by the Mission President of each mission, based on local circumstances and the expenses reported to the Church by other missionaries in the same area.

21. The amount requested is subject to modification in the discretion of the Mission President to take into account changing conditions or special circumstances, such as extra travel expenses incident to certain supervisory positions to which missionaries may be called. It is Church policy to have Mission Presidents increase or decrease the amount requested as necessary in order that the amount requested and the amount donated equals as nearly as possible the actual expenses the missionary will incur to the Church.

22. Surpluses of contributions over expenditures are not contemplated because the monthly amount requested is determined by the Mission President based upon conservative estimates of actual need. Furthermore, if a surplus starts to develop, the missionary is expected to

take action to have the amount of the donation sent to him appropriately reduced.

23. If for any reason expected contributions are not forthcoming from the anticipated sources, the Church assumes the burden of locating other sources of contribution to continue uninterrupted funding of the missionary program. Such additional sources may include other members of the local congregation from which the missionary comes, specific donors from other parts of the Church, or use of Church general missionary funds.

24. The selection of a missionary is not conditioned upon the willingness of any one individual to provide sufficient financial support to the Church program. Although the missionary is welcome to assist the Church officials in finding adequate sources of financial support, Church officials assume ultimate responsibility to locate financial support for every worthy missionary candidate by soliciting contributions from local congregation members, members of other congregations, or seeking general Church missionary funds.

IN WITNESS WHEREOF the affiant hereto sets his hand before the undersigned notary public and acknowledges under penalties of perjury that the foregoing statements are true and accurate to the best of the affiant's knowledge and belief on this 30th day of April, 1987.

/s/ Robert L. Backman
ROBERT L. BACKMAN

/s/ Marilyn H. Pare
Notary Public, Residing at
Salt Lake City, Utah

My Commission Expires: April 15, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

AFFIDAVIT OF HAROLD DAVIS

STATE OF IDAHO
COUNTY OF BONNEVILLE ss.

1. The affiant is a plaintiff in the above-entitled matter.

2. During 1980 plaintiffs' son Benjamin Davis served as a missionary on behalf of The Church of Jesus Christ of Latter-day Saints ("Church"). In 1981 plaintiffs' sons Benjamin Davis and Cecil Davis both served as missionaries on behalf of the Church.

3. Prior to either son serving on a mission, the plaintiff was familiar with the Church's mission program having had previous children serve missions on behalf of the Church, and having received information from Church authorities throughout their lives regarding missionary work.

4. Before each missionary was called to serve a mission, plaintiff agreed to provide to the missionary the amount of money requested by the Church for the appropriate mission in which the missionary would serve.

5. Based on personal experience and Church custom, the plaintiffs knew that the Church would provide specific financial information for each missionary which would define the amount which the missionary should receive.

6. The amount of money which plaintiffs transferred to each missionary's checking account for which a charitable contribution deduction is claimed does not exceed the amount set by the Church.

7. The primary motive of the plaintiffs in providing the amounts requested by the Church was a sincere religious desire to follow the instructions of the Prophet to support the Church's missionary program.

8. The plaintiffs were aware that if they did not provide the necessary expenses incident to the missionary services of their sons that the Church would provide the required money from mission funds maintained by both the ward and stake to which the plaintiffs belong. The plaintiffs had previously contributed to these funds themselves, and knew of both their existence and the Church policy to see that every worthy member serve a mission.

9. The plaintiffs had an understanding with each son that the money sent in accordance with the Church's instructions would be used only in accordance with Church policy for mission expenses.

10. The money transferred by the plaintiffs to the missionaries for which a charitable contribution deduction is claimed was transferred to the missionaries because they were in fact missionaries (as opposed to being merely plaintiffs' sons), was subject to a clear understanding and commitment by the sons that the money would be used only in accordance with Church guidelines for necessary mission-related expenditures and was not intended for the sons to use as they might see fit. If the sons had not been missionaries or if they had not agreed

to use the money in accordance with Church instructions, the plaintiffs would not have provided the money to them.

11. The plaintiffs have received no pecuniary benefit from the contributions made in support of the Church's missionary program.

12. In agreeing to provide the money necessary for mission-related expenses, the plaintiffs knew and understood that the mission president would retain authority to adjust the monthly amount as necessary to reflect changes in mission costs or missionary circumstances such as the use of a car or assignment to higher or lower cost of living areas.

13. Both the method of transfer and the amount transferred to each missionary was in accordance with the instructions received from the Missionary Department of the Church which each missionary forwarded to the plaintiffs.

IN WITNESS WHEREOF this affidavit is executed under penalties of perjury this 15th day of April, 1987.

/s/ Harold Davis
HAROLD DAVIS
Affiant

SUBSCRIBED AND SWORN TO before me on the 16 day of April, 1987.

/s/ Bart M. Davis
Notary Public residing in:

_____

My Commission Expires:

_____

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

UNITED STATES' STATEMENT OF MATERIAL FACT

This statement of material fact is submitted in compliance with this Court's rules. Local Rule 6-106.

1. Plaintiffs seek refunds of federal income taxes paid for taxable years 1980 and 1981 in the amounts of $1,779.71 and $2,613.10, respectively.

2. These refund claims are based on plaintiffs' claim that the funds they sent their sons while the sons served as missionaries of the church of Jesus Christ of Latter-Day Saints (Church) qualify as charitable contributions which are deductible under Section 170 of the Internal Revenue Code of 1954.

3. Plaintiffs are members of the Church of Jesus Christ of the Latter-Day Saints and have been since birth. During 1980 and 1981, plaintiffs and their sons were members of the Idaho Fall 29th Ward, Idaho Fall Ammon West Stake of the Church.

4. Plaintiffs customarily give ten percent of their earnings to the Church, annually, as tithing and have done so for at least the ten years preceding the years at issue. In addition, they have made other contributions to the Church, including fast offerings, Ward budget gifts, and missionary contributions.

5. Plaintiffs have several children including two sons, Benjamin and Cecil, who were raised as members of the Church.

6. Plaintiffs customarily give their sons Christmas and birthday presents which are of a personal nature and not excessive in value. Plaintiffs have done so for at least the ten years preceding the years at issue in this case.

7. The Church was listed in the October 31, 1979 issue of the Cumulative List of Organizations described in Section 170 of the Internal Revenue Code 1954.

8. The Church operates a worldwide missionary program which has involved more than 25,000 missionaries each year since 1977.

9. Mission service is voluntary and the missionary receives no compensation for his services, although the Church will pay for minimal mission-caused out-of-pocket expenses if the missionary does not pay for them himself or receive adequate funds from another donor.

10. The Church encourages but does not require its members to undertake a mission. A mission will not qualify the missionary for any lifetime profession or calling and it is not a prerequisite for any position of income or financial remuneration, either inside or outside the Church.

11. Among the requirements for missionary service are that the person must be at least nineteen years of age and in good physical and emotional health. Missionaries must demonstrate a knowledge of the Church's doctrines and acceptance of its principles. Male missionaries are required to be members of the Melchizedek Priesthood.

12. In 1979, Benjamin Davis, who was then 18 years old, applied to become a missionary. He was interviewed by his ward bishop (local congregation) to determine if he met the Church's standards and submitted to his bishop a medical and dental evaluation prepared by his personal physician and dentist.

13. The bishop determined that Benjamin was morally, spiritually and physically qualified to become a missionary, and prepared a written recommendation which Benjamin signed. The bishop also arranged for a personal interview with the president of the stake (which is similar to a diocese).

14. The stake president also determined that Benjamin was qualified to become a missionary. He signed and submitted to the Missionary Department of the Church the recommendation prepared by the bishop together with the supporting medical and dental evaluations.

15. The papers submitted by the stake president were processed by the Church's Missionary Department, which determined that Benjamin was qualified to become a missionary.

16. The Church notified Benjamin that he had been called to missionary service in a letter signed by Spencer W. Kimball, President of the Church. The letter designated the New York, New York Mission as the area where Benjamin would be assigned to serve and requested Benjamin to report to Odgen, Utah for training. A second letter from the Missionary Department of the Church outlined the items of clothing, provided specific information relating to the New York, New York Mission, and advised Benjamin of the estimated amount of money which would be needed to support his missionary service at the training center and in the mission field.

17. In October of 1979, Benjamin Davis was ordained as an Elder in the Church, set apart as a Minister of

the Gospel and Missionary and sent to the Church's Missionary Training Center in Provo, Utah. At the Training Center, Benjamin was instructed in his duties and responsibilities as a missionary. He received a handbook which instructs missionaries on several aspects of their mission including use of their time, studying, learning, teaching, preaching, and certain other matters. The missionary is expected to refer to and follow the instructions in the handbook throughout the mission.

18. In November of 1979, Benjamin Davis traveled at the direction of the Church from Provo to the New York Mission, where he served as a missionary until December of 1981. He lived with companions and in areas selected by the Mission President, and lived in no single location for more than eight months.

19. By the time he arrived at the New York mission, Benjamin had exhausted his savings, approximately $1,500, having spent the money on clothing, a bicycle, one months living expenses in Provo and his airfare to New York. During 1980 and 1981, plaintiffs transferred to Benjamin's personal checking account, on which he was the sole authorized signatory, $3,480.89 and $4,135.00, respectively.

20. Benjamin Davis used this money primarily to pay for rent ($150 per month), food and transportation while he was on his mission. He spent approximately $20.00 per month to purchase religious tracts and other materials used in his missionary work.

21. Benjamin was not required to and did not seek specific approval of the expenditures he made from his personal checking account.

22. Benjamin never received charitable contributions from third parties which he accepted on behalf of the Church and deposited into a church-controlled bank account.

23. Benjamin Davis was not required to and did not turn over to the Church the funds in his personal account not expended by him when he terminated his mission and returned to Utah. He had no unexpended funds when he terminated his mission, having purchased a camera shortly before leaving New York.

24. In 1980, Cecil Davis applied to become a missionary when he was 18 years old. He, too, was interviewed and recommended by his bishop and stake president.

25. When the Church notified Cecil that he had been called to missionary service in 1981, the Church asked Cecil to serve in the New Zealand-Cook Island Mission. Like Benjamin, Cecil received a second letter giving information about the mission and apprising him of the amount of money needed for mission expenses. Cecil was ordained as an Elder and set apart as a Minister of the Gospel and Missionary in June of 1981.

26. Cecil received eight weeks of training (including language training) at the Mission Training Center in Provo, Utah and reported to the New Zealand Cook Island Mission about August 9, 1981, where he served as a missionary on no single island more than six months.

27. During 1981, plaintiffs transferred to Cecil's personal checking account, on which he was the sole authorized signatory, $1,518.00.

28. Cecil primarily used this money to pay for rent, food and transportation, and personal needs while he was on his mission during 1981. Because of the special nature of the Cook Island mission, Cecil spent nothing for religious tracts or materials.

29. Cecil was not required to and did not seek specific approval of the expenditures he made from his personal checking account.

30. Cecil never received charitable contributions from third parties which he accepted on behalf of the Church and deposited into a church-controlled bank account.

31. Cecil was not required to turn over to the Church the funds in his personal account not expended by him when he terminated his mission and returned to Utah. He had no unexpended funds when he terminated his mission.

32. Neither Cecil nor Benjamin had an independent source of funds aside from their own savings, and their family's support during the period of their missionary service.

33. While on their missions, Benjamin and Cecil lived with and engaged in proselyting activities with one of the several other missionaries selected as their companions by the Mission President.

34. During their missionary service, Benjamin and Cecil were generally expected to conform to a daily schedule which called for at least 10 hours per day of actual missionary work in addition to study time, meal time and planning time.

35. Benjamin's actual proselyting time, which included visiting families from door to door, formally teaching families which invited him into their homes, and member instruction, averaged over 70 hours per week. Benjamin also spent ten or more hours per week in study and preparation time. In addition, on one day per week called "preparation day", Benjamin was allowed up to eight hours to shop for groceries, wash clothing, write letters home and attend to personal matters within the limits of mission rules, such as visiting the Empire State Building.

36. Due to the unique nature of his mission, Cecil's service was more varied than Benjamin's. In addition to tracting, discussions and instructing members, Cecil would work with the natives in their taro swamps and in har-

vesting coconuts, building facilities for Church use and other Church-directed tasks. Cecil was assigned to serve on one island from which he had to be evacuated because of inadequate food supplies.

37. Cecil's actual missionary service time averaged about 60 hours per week, in addition to 15-25 hours per week in study and preparation time. In part, this difference in time reflected the need for daily language study in addition to other studies. Like Benjamin, Cecil was also allowed part of a day of preparation time once a week which was used for shopping, washing, mending clothes, writing and other personal matters.

38. Each week Benjamin and Cecil submitted a report to their Mission President and Zone Leader. The report covered the amount of time spent in Church service, the type of missionary work accomplished and provided space to discuss matters of interest or concern which either boy felt should be called to the attention of the Zone Leaders or the Mission President. It also contained a report of the total expenses for the week and for the month to date. Any expenditures in excess of the permitted amount required detailed explanation to the Mission President. Both boys complied with the Church's instructions.

39. During their missions, neither Benjamin nor Cecil ever received charitable contributions from third parties other than their families. None of the payments were deposited into a Church-controlled bank account. This was consistent with Church policy.

40. Neither Benjamin nor Cecil gave to the Church any funds from his personal account not expended by him when he terminated his mission and returned to Idaho, because neither had any unexpended funds when he terminated his mission.

41. Plaintiffs did not claim as a charitable contribution deduction on their timely filed 1980 and 1981 Joint U.S. Individual Income Tax Returns, forms 1040, the amounts they paid to their sons during their missionary

service. They claimed Benjamin and Cecil as dependents in each of those years, however. True and correct copies of these returns are attached to this statement as Exhibits A and B, respectively.

42. On or about April 16, 1984, plaintiffs filed with the Ogden Service Center Amended U.S. Individual Income Tax Returns, forms 1040X, for the years 1980 and 1981, claiming as additional charitable contributions $3,480.39 and $4,882.00 which they paid to their sons during the sons' missionary service. True and correct copies of those amended returns are attached to this statement as Exhibits C and D, respectively.

43. On January 30, 1985, the Service Center advised plaintiffs that no refunds would be granted. Plaintiffs' attorney requested that the claims be disallowed so that this suit could be filed. This was done on April 12, 1985.

44. Plaintiffs timely filed this refund suit on July 15, 1985.

45. In September of 1986, plaintiffs filed a second set of amended returns, limiting their charitable deductions to the amounts "requested" by the Church and correcting the number of dependents claimed for each year. Copies of those amended returns are attached to this statement as Exhibits E and F.

Dated this 30th day of March, 1987.

MAURICE O. ELLSWORTH
United States Attorney

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